UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS, LLC, Respondent,	)	
and	)	Case Nos. 14-CA-197985
	)	14-CA-208242
CHARLES ROBINSON, an Individual, Charging Party.	)	

RESPONDENT GENERAL MOTORS, LLC'S BRIEF IN RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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I. Introduction.

On September 5, 2019, the National Labor Relations Board ("NLRB" or "Board") issued a Notice and Invitation to File Briefs inviting parties and *amici* to address five questions related to the Board's application of *Atlantic Steel Co.*, 245 NLRB 814 (1979), dealing with whether or when the National Labor Relations Act ("NLRA" or "Act") protects employees from discipline when they use profanity and engage in other objectionable workplace conduct including (among other things) racially or sexually charged statements. Respondent General Motors LLC, by counsel, submits this brief in response to the Notice. General Motors urges the Board to repudiate the *Atlantic Steel* test to be more consistent with the realities of the modern workplace – including every employee's right to be free from exposure to unlawful workplace harassment and discrimination – and the proliferation of laws and regulations prohibiting such behavior. However, regardless of whether the Board modifies or retains *the Atlantic* Steel framework and similar cases, the Board should conclude that the actions of Charles Robinson ("Charging Party") on April 11, 2017 were unprotected under the Act.

The current *Atlantic Steel* framework improperly attaches weight to factors unrelated to the objectionable nature of employee conduct, which have repeatedly resulted in Board decisions that "protect" racially and sexually offensive behavior contrary to Title VII and other civil rights laws. The *Atlantic Steel* factors adversely affect *all* employees who are exposed to such behavior, and they increase the risk of employer liability for workplace harassment and unlawful discrimination. Employers in the United States are required, both legally and morally, to prevent and redress unlawful discrimination and harassment in the workplace. For example, General Motors and the UAW collectively maintain an anti-harassment policy that makes clear that conduct such as that in which Charging Party was engaged is unacceptable. That mutually agreed upon policy, provided at Joint Exhibit 1, reads in part:

> All employees are expected to deal fairly and honestly with one another to ensure a work environment **free of intimidation and harassment**. Abuse of the dignity of anyone, through ethnic, **racist**, religious or **sexist** slurs or through **other derogatory or objectionable conduct, is offensive and unacceptable employee behavior**.
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> **Demeaning, disrespectful**, or **insensitive** jokes, cartoons, pictures, **language**, (particularly if they relate to **race**, **sex**, age, ethnicity, religion, national origin, disability, sexual orientation, or gender identity/expression) **are inappropriate for the GM work environment**. Likewise, lewd, vulgar, or **profane gestures** and unwanted touching **may be offensive to people and may result in an uncomfortable or hostile work environment. These types of conduct will not be tolerated in the workplace. GM's facilities must be free of hostility resulting from sexually oriented and other prohibited behaviors**. It is the **responsibility of management** and each employee to maintain an environment free of disrespect and hostility.

[Jt. Ex. 1, p. 565-66 "Doc 99"] (emphasis added).

The Board should repudiate, or at least revise this standard as explained below and create a more realistic approach to combatting inappropriate conduct in today's workplace. The remainder of this brief provides a summary of GM's position, and then addresses the five questions posed by the Board for supplemental briefing.

II. Summary: The *Atlantic Steel* Framework Should Be Abandoned, It Disregards Other Legal Requirements and is Irreconcilable With NLRA Section 10(c).

The Board has properly asked whether the Board should change its existing legal standards – especially the four-factor framework in *Atlantic Steel Co.*, 245 NLRB 814 (1979) – that protect many profane and/or racially charged statements depending on (1) "the place of the discussion," (2) "the subject matter of the discussion," (3) "the nature of the employee's outburst," and (4) "whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* at 816. GM believes that *Atlantic Steel* should not merely be changed; it is fundamentally

inconsistent with current laws that govern the workplace, including the NLRA itself. The *Atlantic Steel* factors should be abandoned entirely for three compelling reasons.

First, *Atlantic Steel* merely involved an employee who called his supervisor a "lying s.o.b." *Id.* at 814. By contemporary standards, this barely even qualifies as profanity. Yet, over time, the *Atlantic Steel* factors have been broadly interpreted by the Board to "protect" all kinds of outrageous conduct that bears no resemblance to the narrow, relatively tame behavior that was at issue in Atlan*tic Steel* itself. See, e.g., *Pier Sixty, LLC*, 362 NLRB No. 59 (2015) (employee's Facebook post called supervisor a "NASTY MOTHER FUCKER" and stated "Fuck his mother and his entire fucking family!!!").

Second, *Atlantic Steel* was decided in 1979, when the current internet did not even exist, and which was seven years before the Supreme Court recognized that "hostile environment" workplace harassment was actionable under Title VII. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Board's decision in *Atlantic Steel* also did not acknowledge the NLRB's obligation to accommodate other statutory requirements, even though this duty was described by the Supreme Court more than 70 years ago in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). There, the Court stated:

> [T]he Board *has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.* Frequently the entire scope of Congressional purpose calls for *careful accommodation of one statutory scheme to another*, and it is *not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.*[1]

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[1] *Southern Steamship Co. v. NLRB*, 316 U.S. at 47 (1942) (emphasis added). *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003) ("[T]he Board . . . is obligated to defer to other tribunals where its jurisdiction under the Act collides with a statute over which it has no expertise."); *New York Shipping Assn. v. Federal Maritime Comm.*, 854 F.2d 1338, 1367 (D.C. Cir. 1988), *cert. denied* 488 U.S. 1041 (1989) ("[T]he agency must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute.");

Third, the *Atlantic Steel* factors are inconsistent with the NLRA Section 10(c), 29 U.S.C. § 160(c), which states: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, *if such individual was suspended or discharged for cause*" (emphasis added). Section 10(c) was added to the NLRA as part of amendments that were part of the Labor Management Relations Act ("LMRA"), adopted in 1947, and the Conference Report described Section 10(c) as follows:

> [I]n section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that *no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause*, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. . . . Under existing principles of law developed by the courts and recently applied by the Board, *employees who engage in violence . . . or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement.* The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c).[2]

Congress added the "cause" language in Section 10(c) to make the Act's protection *unavailable* when an employee's actions, objectively, constitute "cause" for suspension or discharge *based on considerations unrelated to the NLRA*. The *Atlantic Steel* framework does the opposite: its incorrect premise is that the Board, when enforcing the NLRA, is empowered to disregard an employee's inappropriate workplace conduct involving profanity or racially charged comments. This is precisely what Section 10(c) prohibits. When evaluating an employee's use of profanity or racially charged conduct, the Board must evaluate whether the employee's actions constitute "cause" for suspension or discharge, taking into account Title VII, concerns about workplace

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[2] H.R. Rep. 80-510 at 39, 59 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (hereinafter "LMRA Hist.") at 543 (emphasis added). For a comprehensive description of Section 10(c) and its legislative history, see *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1142-1146 (2014) (Member Miscimarra, concurring in part and dissenting in part), *petition for review denied*, 873 F.3d 1094 (9th Cir. 2017); *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 33-39 (2016) (Member Miscimarra, concurring in part and dissenting in part).

harassment or violence, and other standards of workplace conduct. If "cause" exists, Section 10(c) indicates that the Board's inquiry comes to an end.

The above principles demonstrate that the protection traditionally afforded to conduct involving racially charged statements and profanity, based on the *Atlantic Steel* framework, is irreconcilable with the Act, contrary to other legal requirements applicable to the workplace, and unsupported by common sense. This is consistent with the *amicus* brief expressed in this case by the Equal Employment Opportunity Commission ("EEOC"), which indicates that, among other things, (a) "Title VII does not have any 'crude environment' exception for harassment that otherwise meets the standard,"[3] (b) "while context matters when assessing harassment, the fact that the work environment may be permeated with profanity, or other offensive language or conduct, does not negate a finding that the challenged conduct is actionable,"[4] (c) "the fact that harassment occurs in a particular kind of workplace, such a medical office, does not defeat a finding of an actionable hostile work environment,"[5] (d) "there is no leeway granted employees who make racist or sexist comments because they may have heated feelings about workplace matters,"[6] (e) "courts have recognized in Title VII cases that even isolated uses of extremely severe racial slurs may be actionable,"[7] (f) "racial images in the workplace can be sufficiently severe to create a hostile work environment, even if the images are not pervasive,"[8] (g) "*it is . . . critical that employers are able to take corrective action as soon as they have notice of harassing conduct . . .*

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[3] Brief of the EEOC as Amicus Curiae, at 12 (Nov. 4, 2019) ("EEOC Brief").

[4] *Id.*

[5] *Id.*

[6] *Id.* at 13.

[7] *Id.* at 15 (citations omitted).

[8] *Id.* at 16.

even if the harassing conduct has not yet risen to the level of a hostile work environment,"[9] and (h) "*employers should be able to address and take corrective action vis-à-vis workers who use . . . racist and sexist language while otherwise lawfully exercising their rights under the NLRA.*"[10]

The Board should recognize that *all* employees substantially *benefit* from workplaces that are free from inappropriate racially or sexually charged conduct and language. By protecting particular individuals who engage in this type of objectionable behavior, the Board has afforded illusory "protection" that, in actuality, causes substantial harm to *all* employees in the workplace. This is contrary to the central focus of the NLRA, the cornerstone of which involves collective action and the interests of employees on the whole. The Board's approach has even more substantially disregarded the legal responsibility of employers to protect employees by complying with a broad spectrum of other federal, state and local workplace requirements. As indicated in *Fresh & Easy Neighborhood Market, Inc.*, "An employer is the only party on the scene, in real time, who can give employees what is required by the numerous employment statutes that focus on "outcome"—i.e., a legally compliant workplace."[11]

The false premise of *Atlantic Steel*, as applied by the Board in countless cases, is that a conflict exists between the NLRA (which Congress adopted in 1935) and the anti-harassment and anti-discrimination laws and policies (which were adopted much more recently). Yet, as was the case in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1625 (2018), a "close look . . . turns out to reveal no conflict at all." Nothing prevents employees from having free reign to engage in protected concerted activities, within the meaning of Section 7 of the Act, while conforming those

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[9] *Id.* at 18 (citation omitted; emphasis added).

[10] *Id.* at 22 (emphasis added).

[11] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 171 (2015) (Member Miscimarra, concurring in part and dissenting in part).

activities to reasonable standards of civility, and no authority exists for the proposition that the NLRA affords immunity or greater rights and obligations than those imposed by more recent anti-harassment and anti-discrimination laws adopted by Congress. To the contrary, the Supreme Court in *Epic Systems* held that "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive *'to give effect to both.'*" *Id.* at 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Accordingly, the Board should overrule *Atlantic Steel* and conclude there is no conflict between (i) facially neutral employer policies and actions that prohibit profanity and other objectionable conduct consistent with common sense standards of workplace behavior, anti-harassment laws and anti-discrimination requirements, and (ii) concerted protected activities under Section 7 of the NLRA. It is entirely appropriate for the Board to require employees, while engaging in NLRA-protected activities, to comply with policies, laws and regulations that promote and advance civility, respect and decency in the workplace.

If not repudiated, the Board should at minimum undertake a comprehensive overhaul of the *Atlantic Steel* standard.

III. The Board Should Give Greater Weight To The Nature Of The Outburst Factor.

Question 1 in the Board's Notice and Invitation to File Briefs seeks input on the following inquiries:

> 1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? In *Plaza Auto*, although the nature of Aguirre's outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act's protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say that it ever could. Are there circumstances under which the "nature of the employee's outburst" factor should be dispositive as to loss of protection, regardless of the remaining Atlantic Steel factors? Why or why not?

The Board's current *Atlantic Steel* framework requires the factfinder to balance the following factors: (1) the location of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

The *Atlantic Steel* factors – specifically, factors 1, 2 and 4 – impermissibly disregard the objectionable nature of the employee's actual conduct (the focus of factor 3), and they inappropriately grant employees, particularly employees with union leadership roles, a license to disregard rules of civility and appropriate conduct. The impact of this low bar is particularly troublesome as it relates to employees who serve in a union leadership role. These employees, like Charging Party in the case at hand, are viewed as leaders by other employees. When those leaders are permitted to engage in objectionable workplace conduct, this encourages similar statements and actions by others which undermine the ability of the employer and its managers to provide a legally compliant workplace.

The Board should revise its standard to focus exclusively on the nature of the outburst factor, and the other factors should be disregarded except for the consideration of the context in which the disputed actions take place. When evaluating "context," however, the Board should overrule the suggestion in *Atlantic Steel* that a person's objectionable workforce behavior is "protected" when the person is attempting to address employment-related matters. Rather, the Board should limit its evaluation of "context" to surrounding circumstances that shed light on *what actually occurred*, and the Board should no longer find that "context" can confer immunity from discipline when employees engage in racially or sexually inappropriate actions. The consideration of "context" should prompt the Board to *deny* protection based on risks and concerns that arise

under Title VII, the ADA, the ADEA and other laws. As explained in the EEOC's amicus brief that has been submitted in this case:

> The Supreme Court has . . . instructed that context matters when determining whether conduct is actionable under Title VII. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998), the Supreme Court stated that the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." The objective hostility of the harassment, the Court added, requires "an appropriate sensitivity to social context." *Id.*; *see also* 29 C.F.R. § 1604.11(b) (stating in Guidelines that whether conduct is actionable depends upon "the totality of the circumstances," including "the context in which the alleged incidents occurred").
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> *Sensitivity to social context does not mean, however, that prevailing workplace culture negates discriminatory conduct. . . .* Title VII does not have any "crude environment" exception for harassment that otherwise meets the standard. In other words, while context matters when assessing harassment, *the fact that the work environment may be permeated with profanity, or other offensive language or conduct, does not negate a finding that the challenged conduct is actionable, so long as the offensive conduct is both objectively and subjectively severe or pervasive and is based on the plaintiff's protected trait.* See, e.g., *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 (11th Cir. 2010) (en banc) ("[A] member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct."); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008) (rejecting district court's suggestion that harassment might be discounted in environment that was "inherently coarse" and stating, "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most").
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> Although context matters under Title VII, *there is no leeway granted employees who make racist or sexist comments because they may have heated feelings about workplace matters. . . .* At least under Title VII and the statutes the EEOC enforces, *Oncale's* requirement of "appropriate sensitivity to social context" does not require employers to tolerate sexist and racist language, even if the language is used during contentious discussions about promotions, salary, transfers, and other working conditions, and even if the employer provokes the employee by confronting him about his work performance. *See Costrini v. Kroger Co. of Mich.*, No. 17-13688, slip op. at 20-21 (E.D. Mich. Sept. 10, 2019) (in ADA case, rejecting plaintiff's argument, based on NLRB precedent, that his supervisor provoked his use of profanity and stating that the doctrine of "provoked insubordination" is "unique to cases governed by the NLRA" and has not been adopted in employment discrimination cases).[12]

[12] EEOC Brief at 11-13 (emphasis added).

In *Plaza Auto Center*, the Board found that the nature of the outburst factor weighed against protection, but nonetheless found the conduct protected because "[i]t is possible for an employee to have an outburst weigh against him yet still retain [the Act's] protection because the other three [*Atlantic Steel*] factors weigh heavily in his favor." 360 NLRB 972, 977 (2014) (citing *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 27 fn. 1 (D.C. Cir. 2011)). In that case, the Board found the remaining three factors weighed heavily in favor of protection. First, the subject matter of the discussion was about terms and conditions of employment. Second, it took place away from other employees. Third, the employer provoked the employee's outburst by making threats of discharge.

As demonstrated in *Plaza Auto Center* and also in the case at hand, the subject matter factor is merely a rehash of the initial question of whether the employee is engaged in protected concerted activity. See *Plaza Auto Center*, 360 NLRB 972 (2014) ("the subject matter concerned Aguirre's concerted complaints relating to terms and conditions of employment"); *General Motors*, ALJD at 18 ("This issue was directly related to Robinson's protected concerted activity, and therefore weighs in favor of Robinson's receiving the Act's protection.") Thus, this factor adds no value to the test, as the employee's conduct is not subject to the *Atlantic Steel* test unless it has already been determined that they were engaged in protected concerted activity. The practical effect of this unnecessary factor is that it automatically favors protection.

The location factor also rests on a false premise and should not be given as much weight as the nature of the outburst. The false premise is that merely because an employee's outburst occurs away from other employees, it is less likely to undermine the employer's interest in maintaining order and discipline. See *Plaza Auto Center*, 360 NLRB 972 (2014) ("An employer's interest in maintaining order and discipline in his establishment is affected less by a private

outburst in a manager's office away from other employees than an outburst on the work floor witnessed by other employees.") This rationale ignores the reality of the workplace which is that employees talk and a supervisor's ability to maintain discipline is eroded when employees realize they can use protected concerted activity as a shield to protect themselves when engaging in misconduct. An employee who is able to engage in a personal ad hominem attack against his supervisor, and not suffer discipline merely because it occurred away from the shop floor, has undermined that supervisor's (and thus his or her employer's) ability to maintain order and discipline without other employees hearing the actual outburst. Employees will learn of this episode and the supervisor, with his hands tied due to the Board's current *Atlantic Steel* test, will be viewed as having little power to correct employee misconduct and misbehavior in the workplace. As noted above, this problem is exacerbated when the employee engaging in the outburst is a union leader who other employees look up to as a model of acceptable behavior in the workplace. This is not to say that these two factors are meaningless, as they do serve valuable purposes, but they should not be given as much weight as the important inquiry of whether the outburst went too far.

Nor is there merit in considering the final *Atlantic Steel* factor – whether the outburst was provoked by potential unfair labor practices. For example, in the case at hand, the ALJ found Robinson's April 11, 2017 outburst "was provoked by an unfair labor practice" because "Robinson held an honest belief that such refusal [to provide overtime coverage for cross-training] constituted an unfair labor practice and breach of an agreement." [ALJ, p. 21]. Of course, no unfair labor practice was filed, or even alleged, that related to this cross-training and overtime issue.[13] Merely

[13] In fact, as argued in the Respondent's Brief in Support of Exceptions, Charging Party did not hold an honest belief, because the UAW and General Motors had agreed otherwise in their national agreement. [*See* Jt. Ex. 1, p. 588 "Doc 112"].

because the employee felt he was wronged, this factor weighed in favor of his protection. Such a low bar should not be held to the same gravitas as the crucial nature of the outburst factor. Employees who engage in workplace outbursts often do so because they feel they have been wronged, and the ALJ's decision in this case highlights how difficult it can be for a factfinder to determine if the employee's belief is "honest." While the factor is necessary to address situations like that in *Plaza Auto Center*, where the employer made threats of discharge, it is too low a bar in situations where the employee's "honest belief" allows for this factor to weigh in his favor.

IV. The Board's *Atlantic Steel* Test Should Not Operate To Protect Employees Engaged In Racially Or Sexually Offensive Language Or Conduct And Should Not Require Employers To Run Afoul of State and Federal Antidiscrimination Laws.

Questions 2 and 5 in the Board's Notice and Invitation to File Briefs seek input on the following inquiries:

> 2. The Board has held that employees must be granted some leeway when engaged in Section 7 activity because "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?
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> 5. What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?

The Board's current position under *Atlantic Steel* is that employees must be granted some leeway when engaged in Section 7 activity because "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). The realities

of industrial life, however, should not permit the Board to go rogue and protect racially or sexually offensive language or conduct that takes place under the auspices of Section 7 activity.

Simply put, there is no reason why the Board should permit employees to engage in racially or sexually offensive conduct in the workplace. Thus, the only relevant consideration in this context is whether the conduct is racially or sexually offensive to others. As noted in the EEOC's Brief submitted in the instant case, "context matters under Title VII, [but] *there is no leeway granted employees who make racist or sexist comments because they may have heated feelings about workplace matters.*" EEOC Brief at 13.

Importantly, the Board taking a stand against racially and sexually offensive language or conduct will not erode employees' rights under Section 7. Section 7, of course, does not permit employees to engage in sexually or racially offensive conduct, and the fact that Section 7 disputes may "engender ill feelings and strong responses" does not give license to employees to harass, demean, or ridicule others in a racially or sexually offensive way. As the D.C. Circuit eloquently argued, "America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them." *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001). A standard that holds employees to a higher standard – a standard that prohibits employees from benefiting from the protection of Section 7 where they engage in sexually or racially offensive conduct – would serve both employers and the labor movement well.

In today's workplace, employers face increasing liability resulting from racially and sexually offensive conduct. For example, when the EEOC began collecting data on the number of charges it received, that number was just over 72,000 in 1992. In the past decade, that number has

eclipsed 99,000 in three separate years, an increase of roughly 38 percent.[14] In her dissent to the NLRB's Notice and Invitation to File Briefs, Member McFerran claimed that "the Board's decisions create no conflict with employer's obligations under Title VII," citing the Eighth Circuit's decision in *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885, 891-92 (8th Cir. 2017). *General Motors LLC*, 368 NLRB No. 68, slip op. at 5. The majority addressed this concern, however, citing other federal court precedent finding that a single racially-charged slur could support a hostile work environment claim. *Id.* at 2 fn. 8. Whether conduct that may be protected under Section 7 is sufficient to create a legally cognizable hostile work environment claim ignores the practical concerns that employers face. Simply stated: the Board's current framework makes it more likely that employers will have to defend harassment-related lawsuits and charges because it was compelled to preserve the employment of an alleged harasser who was engaged in protected concerted activities. Employees who see a coworker engage in harassing behavior with no repercussions will lose faith in their employer's ability to maintain a harassment-free workplace, sinking employee morale and damaging employers' relationships with their employees.

Today's work culture is not one that permits employers to take weak stands against racially or sexually offensive conduct in the workplace. Employers have both a legal and moral obligation to eradicate such conduct in their workplace, and the Board should support that measure, not fight against it. Indeed, taking a strong stand against harassing and offensive behavior in the workplace, even when done in the context of protected activity, would put the NLRB in line with other Government agencies like the EEOC and make it an advocate for employees while partnering with employers in an attempt to eradicate this behavior from workplaces in the United States.

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[14] *See Charge Statistics FY 1992 Through FY 1996*, (available at https://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm) (last visited 11 November 2019); *Charge Statistics FY 1997 Through FY 2017* (https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (last visited 11 November 2019).

V. The Board Should Weigh All Rules And Practices Of The Workplace When Determining If An Employee's Outburst Is Unprotected.

Question 3 in the Board's Notice and Invitation to File Briefs seeks input on the following inquiry:

> 3. In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. See, e.g., *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?

Norms and practice are relevant as to whether an employee's outburst has gone too far, but the Board should no longer apply any type of "shop talk" exception that affords blanket protection when employees use objectionable speech or engage in objectionable conduct during the exercise of protected activity.

Just because employees use profanity on the shop floor does not mean that profanity directed at another individual should be lumped into that norm or practice. Former Member Johnson expressed this concern in his *Plaza Auto Center* dissent, noting: "whatever the workplace context with respect to the frequency of swearing, there is a major distinction to be drawn between that conduct and 'repeated, sustained, ad hominem profanity' that amounts as well to insubordination when directed towards management." 360 NLRB at 986 (citing *Laborers Local 872*, 359 NLRB No. 117, slip op. at 3, fn. 10 (2013) (recognizing "the legitimate distinction between expletives expressed generally and those directed at individuals.") Indeed several cases have applied this rule, such as *Corrections Corp. of America*, 347 NLRB 632, 636 (2006), where an employee's use of profanity, not directed at any individual in particular, was found protected because other profanity was used in the workplace. Further, in *Aluminum Co. of America*, 338 NLRB 20, 22 (2002), a profane outburst which included calling supervisors "those mother

fuckers" was not protected because it "far exceeded that which was common and tolerated in his workplace." The problem is that the Board has not consistently followed this reasonable approach.

For example, in *Pier Sixty, LLC*, 362 NLRB No. 59 (2015), the Board ordered an employee back to work after he posted on Facebook that his supervisor was "such a NASTY MOTHER FUCKER" and "Fuck his mother and his entire fucking family!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" Part of the Board's analysis favoring protection was that the employer "tolerated the widespread use of profanity in the workplace, including the words 'fuck' and 'motherfucker.'" What was not addressed, however, is whether the employer tolerated its employees calling their supervisors "mother fucker" or whether it further permitted employees to make similar profane remarks about the families of supervisors. *Pier Sixty, LLC* thus expanded the scope of the "shop talk" exception and permitted egregious and dissimilar conduct simply because profanity was used in the workplace, despite the conduct in question deviating significantly from the workplace custom.

Further, when taking into account the norms of the workplace, the employer's rules and policies must be considered as part of those norms. In the case at hand, the Respondent's policy, agreed to by the UAW, sets forth a clear policy that should be given weight by the Board. Ultimately, this analysis should not be dispositive to the question of whether the nature of the outburst factor favors or disfavors protection. Even in situations where profanity or crudeness are commonplace, employers must still be given the benefit of the doubt to maintain order and discipline where a particularly profane ad hominem attack, like that engaged in by Charging Party in this case, exceeds conduct that the employer permits in the workplace. Indeed, the Supreme Court recognized the need to protect an employer's right to discharge employees and control the workplace when Chief Justice Hughes admonished the Board not to use its authority as "a pretext

for interference with the right of discharge when that right is exercised for other reasons than [] intimidation and coercion." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937).

When it comes to the consideration of workplace norms, the Board's reasoning has been out of step with other laws governing the workplace. An employee's use of profanity, or racist or sexually charged speech, should not be regarded as permissible merely because an employer may have been inconsistent in its efforts to eradicate this behavior in the workplace. In *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008), the Court of Appeals for the Fourth Circuit rejected arguments that objectionable conduct is more permissible in a work environment that is "inherently coarse," and the court stated: "Title VII contains no such 'crude environment' exception, and to read one into it *might vitiate statutory safeguards for those who need them most.*" *Id.* at 318 (emphasis added). See also EEOC Brief at 12 (same).

VI. The Board Should Not Permit Racially Or Sexually Offensive Conduct To Be Protected On The Picket Line.

Question 4 in the Board's Notice and Invitation to File Briefs seeks input on the following inquiry:

> 4. Should the Board adhere to, modify, or abandon the standard the Board applied in, e.g., *Cooper Tire*, supra, *Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context—e.g., picket-line setting—when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?

As noted above, there is no reason why the Board should permit employees to engage in racially or sexually offensive conduct in the workplace. This principle should further apply on the picket line. The Board's precedent in *Cooper Tire & Rubber Company*, 363 NLRB No. 194 (2016) has created a safe haven for misconduct on the picket line that is dangerous and demeaning to

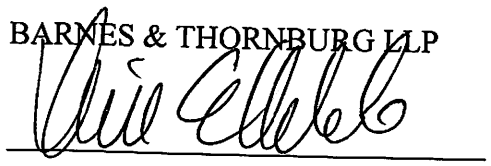
replacement workers and also not helpful to resolving labor disputes. Context matters, and the Board and courts have long found that employees are given more leeway while on the picket line. *See Clear Pine Mouldings*, 268 NLRB 1044 (1984); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977) (finding that an employer can lawfully deny reinstatement to a striker if his misconduct is such that under the circumstances, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act). The Board should adopt a clear rule that racially or sexually offensive conduct is the type of conduct that loses the protection of the Act, regardless of whether the conduct occurs in the workplace, online, or on the picket line.

VII. Conclusion.

Respondent General Motors LLC supports the repudiation of the *Atlantic Steel* and urges the Board to set a standard more consistent with the realities of the modern workplace – including every employee's right to be free from exposure to unlawful workplace harassment and discrimination – and the proliferation of laws and regulations prohibiting such behavior. However, regardless of whether the Board modifies or retains *the Atlantic* Steel framework and similar cases, the Board should ultimately conclude that the actions of Charles Robinson ("Charging Party") on April 11, 2017 were unprotected under the Act.

Respectfully submitted,

BARNES & THORNBURG LLP



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT GENERAL MOTORS, LLC'S BRIEF IN RESPONSE TO BOARD'S NOTICE AND INVITATION TO FILE BRIEFS was e-filed with the Executive Secretary of the National Labor Relations Board and was electronically served upon the following persons on this 12th day of November 2019.

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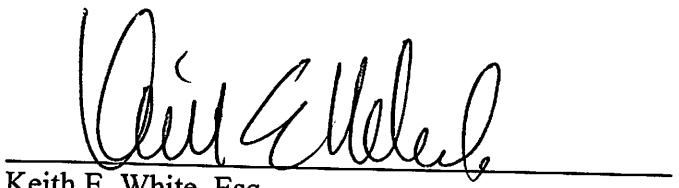

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